

was an affidavit by trial counsel. The affidavit includes the following statements:

1. When I first met Curtis Mitchell, he told me he did not kill the victims in this case.

2. Later on in the course of my representation, he told me that he did. My subjective belief was that this inculpatory story was true. I had no additional inculpatory information other than that provided by the Commonwealth in discovery and by the witnesses at trial.

. . .

3. . . . [When Mitchell decided to testify,] he did not tell me that he was going to commit perjury, or that he was going to lie. I attempted to dissuade him from offering testimony I believed would be perjurious.

. . .

7. I believed [Mitchell's testimony] was perjurious because it contradicted his earlier version of events and was contrary to the evidence provided to me in discovery and presented during the Commonwealth's case.

8. The defendant asked me if he could argue his case in addition to my [closing] argument. I told him that the judge would not allow it and I thought it would hurt rather than help him. . . .

The trial judge denied the motion for a new trial, holding that belief beyond a reasonable doubt that a criminal defendant intends to commit perjury is too high a standard to impose. Instead, the court held, trial counsel may invoke the ethical rule that prevents him from knowingly eliciting perjury without infringing on a

defendant's constitutional rights whenever counsel has a "firm factual basis" for believing that the client intends to perjure himself. The trial judge concluded that trial counsel had such a basis for believing that Mitchell would commit perjury. Memorandum of Decision 33-34.

The Massachusetts Supreme Judicial Court (SJC) affirmed the denial of the motion for a new trial in *Commonwealth v. Mitchell*, 438 Mass. 535, 781 N.E.2d 1237 (2003). The SJC noted that the issue raised here "has constitutional implications by reason of its potential to deprive a defendant of his right to effective assistance of counsel, and his rights to due process and a fair trial, which include the right to testify in his own defense."

Id. at 544. After discussing the various standards that different courts have applied in determining what level of knowledge an attorney must have before concluding that the client intends to perjure himself, the SJC held that the trial judge was correct in applying the "firm factual basis" standard. The court further held that the judge's finding that trial counsel had such a basis was supported by the record. *Id.* at 543-546.

SUMMARY OF ARGUMENT

Under clearly established Federal law, as determined by the Supreme Court of the United States, Mitchell had the

right at trial to the effective assistance of counsel and to due process of law. The precedent establishing these rights applied in the present case, and nothing in *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), where the Court discussed the presumably rare circumstance where a criminal defendant has announced to his counsel his intent to perjure himself, prevented that precedent from applying. Therefore, the SJC's decision involved an unreasonable application of clearly established Supreme Court precedent.

Although the Massachusetts court rejected Mitchell's argument that counsel must know beyond a reasonable doubt that his client intends to commit perjury before withdrawal of counsel's assistance can be justified, the court nevertheless held that counsel must have "a firm basis in objective fact." After settling on this ostensibly stringent standard, the court found that the record supported the trial judge's finding of a firm factual basis on the part of Mitchell's counsel. This factual finding is unreasonable based on the record in this case.

Under the Antiterrorism and Effective Death Penalty Act, when the result reached by a state court "involve[s] an unreasonable application of[] clearly established Federal law as determined by the Supreme Court of the

United States," or when the result is "based on an unreasonable determination of the facts," habeas corpus relief is appropriate. 28 U.S.C. 2254(d)(1). Both circumstances are present in this case.

ARGUMENT

I. AEDPA Standard.

Habeas corpus relief is appropriate under the Antiterrorism and Effective Death Penalty Act (AEDPA) where the result reached by the state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the State court proceeding." 28 U.S.C. 2254(d)(1). Under the "unreasonable application" standard, a federal court may grant the writ if the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Relief is also appropriate if the state court's ruling was based on "an unreasonable determination of the facts in light of the evidence presented at the State court

proceeding." 28 U.S.C. 2254(d)(1)-(2). Here, relief is appropriate both under the "unreasonable application" and the "unreasonable determination of the facts" clauses of the AEDPA.

II. The unreasonable application of Supreme Court precedent.

In regard to the "unreasonable application" standard, although the SJC did not discuss Supreme Court precedent,⁴ the court explicitly recognized the governing legal principle that all criminal defendants are entitled to the effective assistance of counsel. In discussing what level of certainty that the defendant intends to commit perjury counsel must have before the right to counsel is overridden, the SJC noted that "the problem has constitutional dimensions by reason of its potential to deprive a defendant of his right to effective assistance of counsel, and his rights to due process and a fair trial, which include the right to testify in his own defense."

Commonwealth v. Mitchell, 438 Mass. at 544, 781 N.E.2d at 1246.

⁴ The SJC did include a footnote stating that the standard the court applies in capital cases relating to ineffectiveness of counsel is more favorable to defendants than the Federal constitutional standard as stated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984).

It is beyond dispute that the Sixth Amendment right to the effective assistance of counsel is firmly established by Supreme Court precedent. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 59--60, 77 L.Ed. 158 (1932). It is equally clearly established that the right to effective assistance applies at all critical stages of trial. *Michigan v. Harvey*, 494 U.S. 344, 358 n.4, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990), and that the defendant's direct examination and closing argument are such critical stages. *Herring v. New York*, 422 U.S. 853, 865, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (trial judge's order denying counsel the opportunity to make a summation at close of bench trial denied defendant assistance of counsel); *Brooks v. Tennessee*, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972) (law requiring defendant to testify first at trial or not at all deprived accused of "the 'guiding hand of counsel' in the timing of this critical element of his defense," i.e., when and whether to take the stand); *Ferguson v. Georgia*, 365 U.S. 570, 596, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961) (statute retaining common-law incompetency rule for criminal defendants, which denied the accused the right to have his counsel question him to

elicit his statements before the jury, violated the Fourteenth Amendment).

Both the trial judge and the SJC cited the Supreme Court's decision in *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), in support of their decisions in this case, without any in depth analysis of that decision. *Whiteside* is the one Supreme Court decision in which the Court discusses what trial counsel's response should be upon learning that a client intends to commit perjury. The pertinent facts in *Whiteside* are as follows.

Whiteside was charged in Iowa with one count of murder. The defense at trial was to be self-defense. *Whiteside* consistently told trial counsel that he had not actually seen the victim with a gun, but that he believed that the victim was reaching for a gun when he shot him. Trial counsel learned through his investigation that none of the eye witnesses had seen the victim with a gun at the time of the shooting, and police responding to the scene found no gun in the victim's possession. A week before the trial, however, *Whiteside* informed his counsel that he felt he must testify that he saw the victim holding something metallic on the reasoning that, "If I don't

say I saw a gun, I'm dead." Trial counsel threatened to withdraw from the case if Whiteside insisted on perjuring himself. Whiteside testified at trial, but did not claim to have seen a gun.

Whiteside was convicted of second-degree murder, and his conviction was confirmed on appeal. His petition for a writ of habeas corpus was later denied by the federal district court, but the Eighth Circuit reversed, holding that trial counsel's threat to breach the client's confidence fell below the standard of effective assistance of counsel. The Supreme Court then overruled the Eighth Circuit, holding that where the client "announces" his intent to commit perjury, actions taken by counsel to prevent that perjury do not violate the right to effective assistance. The Court elaborated that "[a]n attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct." *Id.* at 176.

Nix v. Whiteside does not stand for the proposition that whenever defense counsel subjectively believes that his client intends to give false testimony he may abandon the client in mid-trial.

Whiteside differed from the present case in that there the client actually announced his intention to commit perjury, while in this case Mitchell never told his counsel that he intended to testify to anything that was not true. Moreover, in *Whiteside* there was a judicial finding that if Whiteside had testified as proposed, his testimony would have been false. *Id.* at 160-162. Here, the determination that Mitchell's testimony would be false was made by counsel alone. In addition, although the Court did not expressly delineate the degree of knowledge counsel must have to invoke the rules of ethics in support of a decision to limit counsel's assistance to the client, the concurring opinion of Justice Blackmun indicates that a very high degree of knowledge would be required. Justice Blackmun wrote that, "Except in the rarest of cases, attorneys who adopt 'the role of the judge or jury to determine the facts,' pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment." *Id.* at 189 (internal citation omitted).

In short, there is nothing in *Nix v. Whiteside* that would prevent the dictates of firmly established Supreme Court precedent from applying in this case,

and the SJC's determination that Mitchell was not entitled to counsel at critical stages of his trial "involved an unreasonable application of[] clearly established Federal law as determined by the Supreme Court of the United States,"

III. The unreasonable determination of the facts.

Although the SJC rejected Mitchell's argument that counsel must believe "beyond a reasonable doubt" that his client intends to commit perjury before invoking ethical Rule 3.3, the court held that such action may be taken only where there is a "firm basis in objective fact" to believe that the client intends to commit perjury. At the same time, the court appeared to recognize that the standard must be sufficiently rigorous that it will prevent application of the ethical rules from having an unjustified impact on defendants' constitutional rights. In this regard, the Court stated, "This standard satisfies constitutional concerns [footnote omitted] because it requires more than mere suspicion or conjecture on the part of counsel, more than a belief and more information than inconsistencies in statements by the defendant or in the evidence. Instead, the standard mandates that a lawyer act in good faith based on objective circumstances firmly

rooted in fact." *Commonwealth v. Mitchell*, 438 Mass. at 545, 781 N.E.2d at 1247.

In other words, while disagreeing with Mitchell's argument that counsel must know beyond a reasonable doubt that his client intends to commit perjury before refusing the defendant assistance, the court nevertheless appeared to hold that a high degree of certainty is required. Yet, despite the announcement of this standard, the SJC went on to find that Mitchell's counsel had a firm factual basis although the record is utterly lacking in support for this conclusion. Instead, the record demonstrates that trial counsel did not act "based on objective circumstances firmly rooted in fact." In his colloquy with the judge, trial counsel repeatedly used phrases connoting ambiguity and uncertainty. Counsel told the judge he thought, "there may be a problem" (Tr. VI/7). He stated that he had "suspicions that [his client's] testimony [was] not going to be truthful" (Tr. VI/6). Slightly but not much stronger was counsel's statement of his understanding that he had certain ethical obligations "if there is something that I reasonably believe is false" (Tr. VI/11).

Trial counsel's affidavit that accompanied the motion for a new trial, see *infra* at 13-14, lends additional support to the view that counsel's belief did not have a

firm factual basis. Counsel's suspicion that his client intended to commit perjury arose because Mitchell made contradictory statements to him: at first, Mitchell denied involvement in the killings; later, Mitchell took responsibility for the killings; finally, Mitchell returned to his initial denial of involvement. Mitchell never told his counsel that he intended to commit perjury. Counsel therefore could have had nothing more than a suspicion that Mitchell intended to commit perjury.

Nor does the fact that counsel perceived the prosecution's case as strong create support for a firm factual belief. If the fact that the client has made contradictory statements plus counsel's perception that the prosecution's case is strong adds up to a firm factual belief, then circumstances where a criminal defendant may be denied his counsel's assistance will be common.

A determination of fact made by a state court, including an appellate court, is presumed to be correct for purposes of habeas corpus review. 28 U.S.C. § 2254(c)(1); *Norton v. Spencer*, 351 F.3d 1, 6 (2000). However, the First Circuit has held that where the state court's determination of the facts is unreasonable in that it is not supported by the

record, no such deference is due. *Id.* Such is the case here.

Although the courts have used various wording to describe the degree of certainty counsel must have before withholding assistance due to a perception that the client intends to commit perjury, the courts have been nearly unanimous in determining that the degree of certainty must be high. See *United States v. Long*, 857 F.2d 436, 447 (8th Cir., 1988) (requiring "a clear expression of intent to commit perjury" before counsel can reveal client confidences); *United States ex rel Wilcox v. Johnson*, 555 F.2d 115, 122 (3rd Cir. 1977) (stating that under "firm factual basis" standard "attorney may not volunteer a mere unsubstantiated opinion that his client's protestations of innocence are perjured"); *Doe v. Federal Grievance Committee*, 847 F.2d 57, 62-63 (2d Cir. 1988) (stating that "firm factual basis" standard is satisfied when attorney has "actual knowledge" based on client's acknowledgement "that he has perpetrated a fraud upon a tribunal"); *United States v. Del Carpio-Cotrina*, 733 F.Supp. 95, 99 (S.D.Fla. 1990) (stating that "actual knowledge standard is necessary to prevent unnecessary disclosure of client confidences and to protect the

fiduciary nature of the attorney-client relationship"); *Shockley v. State*, 565 A. 2d 1373, 1379 (Del. 1989) (requiring knowledge beyond a reasonable doubt); *Commonwealth v. Alderman*, 437 A.2d 36, 39 (Pa. Super. Ct. 1981) (same).

The Massachusetts court appeared to be in sync with those courts that have held that the standard should be high. Indeed, the court elaborated on the "firm factual basis" standard as follows:

Conjecture or speculation that the defendant intends to testify falsely are not enough. Inconsistencies in the evidence or in the defendant's version of events are also not enough to trigger the rule, even though the inconsistencies, considered in light of the Commonwealth's proof, raise concerns in counsel's mind that the defendant is equivocating and is not an honest person. Similarly, the existence of strong physical and forensic evidence implicating the defendant would not be sufficient.

Commonwealth v. Mitchell, 438 Mass. 551. However, the court's application of the standard in this case indicates that a mere suspicion of intent to commit perjury, coupled with a perception that the prosecution's case is strong, is sufficient. This teaching of the Massachusetts court is likely to leave many criminal defendants without representation at critical stages in their cases.

IV. The Cronic and Strickland standards.

A defendant who claims that he has been denied the right guaranteed him by the Sixth Amendment to the United States Constitution to the effective assistance of counsel must generally demonstrate, first, that his counsel's performance was deficient and, second, that his counsel's deficient performance prejudiced him to the extent that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, circumstances may arise during trial that amount to a complete denial of the right to counsel. If such circumstances arise at a "critical stage" of the trial, the defendant is entitled to a presumption that the trial was unfair, and he is not required to show prejudice. *United States v. Cronic*, 466 U.S. 648, 658-659 (1984). Here, Mitchell was deprived of counsel during his own direct examination, a critical stage of the trial. See *Ferguson v. Georgia*, 365 U.S. 570, 596, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961) (statute retaining common-law incompetency rule for criminal defendants, which denied the accused the right to have his counsel question him to elicit his statements before the jury, violated Fourteenth Amendment).

In addition, Mitchell was denied counsel at the sidebar conferences at which the judge decided that counsel

would not be permitted to assist Mitchell. Mitchell was absent for these conferences, and since his counsel was not representing Mitchell's interests in telling the judge he anticipated that his client would commit perjury, Mitchell was utterly without representation at what can only be viewed as a critical stage of his trial.⁵ The trial judge recognized in his rulings on the motion for a new trial that the sidebar conferences were a critical stage of the trial, but held that Mitchell suffered no harm stemming from his absence at the conferences. This was an unreasonable application of Supreme Court precedent, since Mitchell was entitled under *Cronic* to relief without any showing of prejudice.

However, Mitchell did in fact suffer prejudice from the lack of counsel during his direct testimony, and would be entitled on that claim to relief under the *Strickland*'s as well as well as *Cronic*'s. "Prejudice . . . was inevitable from the use of the narrative form, which "could hardly have failed to convey to the jury the impression that [Mitchell's] counsel attached little significance or

⁵ The SJC has recognized that a defendant has the right to be present at sidebar conferences because they are a critical stage of the trial. See *Commonwealth v. L'Abbe*, 421 Mass. 262, 268, 656 N.E.2d 1242 (1995), and cases cited; *Commonwealth v. Angiulo*, 415 Mass. 502, 530, 615 N.E.2d 155 (1993).

credibility to [his] testimony." *State v. Robinson*, 290 N.C. 56, 67, 224 S.E.2d 174 (1976). The jurors would have had to be unsophisticated indeed not to know that testimony in court is taken in the form of questions and answers. Even a juror who has been so sheltered that he or she would not know that this was the norm would have been educated to that fact by the time Mitchell, the last witness in the case, testified. And even if such a juror still saw nothing amiss in counsel's refraining from questioning Mitchell, surely counsel's failure to argue his client's testimony in closing would have filled out the picture.

Moreover, counsel's failure to argue Mitchell's testimony in closing was prejudicial. The right to effective assistance in closing argument is well-established. "[N]o aspect of [our adversary system] could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). Particularly in view of the fact that the defendant's testimony made up nearly all of the defendant's case, his counsel's failure to argue that evidence deprived him of a significant part of his defense. A defendant's testimony is ordinarily an important part of the case, and was demonstrably so here.

During their deliberations, the jurors asked to hear Mitchell's testimony again and were given an audiotape of the testimony for review (Tr. VIII/3-4, 10).

In addition, trial counsel's negating Mitchell's testimony infringed on his right to testify. See *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987) (recognizing that the right to testify is guaranteed by the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination). It should be noted in this regard that not only did trial counsel decline to argue Mitchell's testimony, he actually contradicted it.

Although Mitchell testified that he had nothing to do with the murders, his counsel argued that Mitchell may have been an accessory before or after the fact (Tr. VI/112). By neutralizing the defendant's testimony in this manner, the defendant's own counsel rendered his right to testify meaningless.

CONCLUSION

It is the Sixth Amendment right to counsel that makes all of the other Federal constitutional rights afforded to a criminal defendant meaningful. For this reason, a state court must not set aside that right as lightly as the Massachusetts court has done in this case.

The petitioner therefore asks that his application for a writ of habeas corpus be granted.

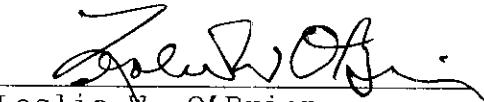
Respectfully submitted
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CERTIFICATE OF SERVICE

I, Leslie W. O'Brien, counsel for the petitioner, hereby certify under the penalties of perjury that I have served Massachusetts Attorney General Thomas F. Reilly, with a copy of the petitioner's petition for habeas corpus with supporting memorandum this 12th day of March, 2004, by first class mail.



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